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## When the Plain Meaning of a Statute Is Not So Plain: The Supreme Court's Interpretation of RCRA's Clarification of the Household Waste Exclusion: *City of Chicago v. Environmental Defense Fund*

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1995]

WHEN THE PLAIN MEANING OF A STATUTE IS NOT SO  
PLAIN: THE SUPREME COURT'S INTERPRETATION OF  
RCRA'S CLARIFICATION OF THE HOUSEHOLD WASTE  
EXCLUSION: *CITY OF CHICAGO v. ENVIRONMENTAL  
DEFENSE FUND*

I. INTRODUCTION

Municipalities throughout the United States presently dispose of their solid waste in either of two ways: depositing it in landfills or burning it in incinerators.<sup>1</sup> The burning of trash as a means of waste disposal only became popular within the last fifteen to twenty years.<sup>2</sup> Beginning in the 1970s, the municipal waste combustor, also known as the incinerator, was promoted as a cleaner, safer and more efficient alternative to landfills.<sup>3</sup>

The benefits of incineration include energy production<sup>4</sup> and the reduction of the volume of municipal solid

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1. ALYCE M. UJIHARA & MICHAEL GOUGH, *MANAGING ASH FROM MUNICIPAL WASTE INCINERATORS: A REPORT 2* (1989) [hereinafter *MANAGING ASH*]; see SENATOR AL GORE, *EARTH IN THE BALANCE* 145-47 (1992) (giving account of America's struggle with choosing means of waste disposal in light of increasing quantities of trash).

2. James V. Delong, *Sackcloth and Ash: City of Chicago v. Environmental Defense Fund*, 24 ENVTL. L. REP. 10536 (Sept., 1994). Waste-to-energy incinerators were promoted in the 1970's as a response to two crises: the energy crisis and the garbage crisis (scarcity of landfill space). *Id.*

3. Under the federal statutory scheme regulating the disposal of solid wastes, Congress lists landfilling as unreliable to assure "long term containment of . . . hazardous waste" and, as a result, a "substantial risk to human health and the environment." Solid Waste Disposal Act ("SWDA"), Title I, § 101(a)(1), 42 U.S.C. § 6901(b)(7) (1988) (SWDA is an amendment to the Resource Conservation and Recovery Act, §§ 3001-5006, 42 U.S.C. § 6901-6991 (1988)).

Consequently, RCRA mandates the immediate development of alternatives to landfilling. *Id.* § 101(a)(1), 42 U.S.C. § 6901(b)(8) (1988).

4. Not all municipal waste incinerators produce energy. There are two types of municipal waste incinerators, those that burn waste for energy and those that burn waste without producing energy. Extension of Date for Submission of Part A Permit Applications for Facilities Managing Ash From Waste-to-Energy Facilities, 59 Fed. Reg. 29,373 (1994). EPA reports that 80% of the 150 municipal waste combustors are of the waste-to-energy type. *Id.* Waste-to-energy incinerators are also referred to as resource recovery facilities. Throughout this Note, the terms "incinerator," "waste-to-energy incinerator," and "resource recovery facility" will be used interchangeably.

Waste-to-energy incinerators produce energy in two different ways. GORE, *supra* note 1, at 156. In some types of waste-to-energy incinerators, the heat generated by incineration is used to make steam, which is then sold as energy. *Id.* In other types of waste-to-energy incinerators, the solid waste is burned and formed into pellets of "refuse-derived fuel" which are then burned to fuel the incinerator.

waste.<sup>5</sup> The benefit of volume reduction is particularly important due to the increasing scarcity of landfill space.<sup>6</sup> Unfortunately, the disposal of municipal solid waste by incineration also has its disadvantages. Most significantly, the ash residue<sup>7</sup> which remains after incineration may contain toxic levels of chemicals and heavy metals such as lead and cadmium.<sup>8</sup> If this ash is disposed of improperly, these toxic constituents can leach into the ground water or surface water supplies.<sup>9</sup> Despite this possible risk, the majority of incinerator operators, until very recently, disposed of this ash as non-hazardous waste by dumping it into non-hazardous waste landfills.<sup>10</sup>

When disposing of solid wastes, municipalities must comply with the Resource Conservation and Recovery Act ("RCRA").<sup>11</sup> Hazardous wastes are subject to costly compliance requirements under Subtitle C,<sup>12</sup> while non-hazardous wastes are regulated under

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*Id.*; see also David C. Wartinbee, Comment, *Incinerator Ash May Not Be a Hazardous Waste, But the Story Doesn't End*, 9 T.M. COOLEY L. REV. 115, 116 (1992).

5. Bradley K. Groff, Note, *Burned-If-We-Do, Burned-If-We-Don't: Treatment of Municipal Solid Waste Incinerator Ash Under RCRA's Household Waste Exclusion*, 27 GA. L. REV. 555 (Winter, 1993). Because the volume of waste can be reduced by 70% to 90% through burning, the need for landfill space is considerably reduced. *Id.* at 556 (footnote omitted).

6. *Id.*

7. There are two types of ash which result from incineration, fly ash and bottom ash. MANAGING ASH, *supra* note 1, at 3. Fly ash is composed of "airborne particles that are captured by filters in the incinerator stack." *Id.* Bottom ash describes "the heavy residue found at the bottom of the incinerator after the municipal solid waste is burned." *Id.* Fly ash generally contains more toxic constituents than bottom ash. Wartinbee, *supra* note 4, at 117. Most incinerators combine bottom and fly ash while it still remains at the facility prior to its disposal. *Id.* Ash, as discussed in this Note, shall refer to either bottom ash or bottom ash combined with fly ash.

8. DeLong, *supra* note 2, at 3. Contact with low dosages of lead may cause destructive neurological effects. Cadmium is classified as a carcinogen. Wartinbee, *supra* note 4, at 118. EPA has set forth procedures for regulating wastes that contain these constituents. See 40 C.F.R. § 261 (1993). For further discussion of EPA regulations pertaining to toxic wastes, see *infra* note 19.

9. MANAGING ASH, *supra* note 1, at 2.

10. Groff, *supra* note 5, at 556. Non-hazardous waste is subject to considerably less stringent standards under RCRA. See *infra* notes 12-13 and accompanying text.

11. RCRA §§ 3001-5006, 42 U.S.C. §§ 6901-91 (1988 & Supp. IV 1992). RCRA classifies solid waste as either hazardous or non-hazardous for regulation purposes. See *id.*, 42 U.S.C. § 6921.

12. RCRA §§ 3001-11, 42 U.S.C. §§ 6921-39(b). Subtitle C requirements are numerous and complex. MANAGING ASH, *supra* note 1, at 13-14. Depending on whether one is a generator or transporter of hazardous waste, the requirements vary but generally call for identification of wastes, recordkeeping, labeling, using proper containers, and reporting spills. Furthermore, before handling any hazardous waste, a permit must be obtained from EPA. *Id.*

Disposal of hazardous waste in a landfill is particularly expensive because Subtitle C requires all hazardous waste landfills to be equipped with a special liner and leachate collection system "to prevent movement of toxic substances from the

the less stringent standards of Subtitle D.<sup>13</sup> Because household waste collected by municipalities usually contains small amounts of hazardous waste that would technically require Subtitle C regulation, the Environmental Protection Agency ("EPA") has promulgated the "household waste exclusion," an exemption from Subtitle C for household waste.<sup>14</sup> Thus, under current regulations, the collection and disposal of municipal waste is not normally subject to Subtitle C requirements. However, under EPA's regulatory scheme, the incineration of municipal waste has presented a problem because it is not clear whether incinerator ash remaining after the burning of household waste is also exempt from Subtitle C. In 1984, Congress passed amendments to RCRA which included a provision entitled "Clarification of the household waste exclusion."<sup>15</sup>

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landfill into groundwater or surface water supplies." *Id.* at 14. Hazardous waste landfills are also required to be equipped with monitoring wells which reach into "the uppermost aquifer underlying the facility." *Id.* These wells must be constantly monitored for potential contamination of water supplies. *Id.* EPA's regulatory scheme pertaining to hazardous waste generators and transporters is set out in full at 40 C.F.R. §§ 261-70 (1994).

13. RCRA §§ 4001-09, 42 U.S.C. §§ 6941-49. Regulation of nonhazardous wastes under Subtitle D is essentially a default provision. The disposal of any wastes not meeting the definition of "hazardous" under Subtitle C is regulated under Subtitle D. However, Subtitle C does impose some independent requirements on non-hazardous waste disposal sites. *MANAGING ASH*, *supra* note 1, at 21. For example, a non-hazardous waste disposal facility must not contaminate the underlying drinking water aquifer beyond the boundary of the facility. *Id.* Also, the facility must comply with procedures "to minimize disease and improve safety". *Id.* But, the liners and groundwater monitoring systems necessary under Subtitle C are not required under Subtitle D. *Id.*

14. The "household waste exclusion" provides:

§ 261.4 Exclusions

(b) Solid Wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any material (including garbage, trash and sanitary wastes in septic tanks) derived from households, (including single and multiple residences, hotels and motels).

40 C.F.R. § 261.4(b)(1)(1994).

Although household waste is composed of primarily non-hazardous materials, it does contain small quantities of hazardous wastes such as pesticides and solvents. Kathleen J. Rutt, Note, *Regulating the Disposal of Municipal Solid Waste Incinerator Ash: The Companion Cases of Environmental Defense Fund, Inc. v. Wheelabrator Technologies and Environmental Defense Fund, Inc. v. City of Chicago*, 4 VILL. ENVTL. L.J. 207, 212 (1993) (footnote omitted).

Municipal solid waste is made up of approximately 50% paper (including newspaper and various forms of packaging), 20% yard waste, construction wood, and assorted organic waste, and 10% plastics. GORE, *supra* note 1, at 151-52. The remaining portion is an "unbelievable conglomeration of odds and ends." *Id.* at 152.

15. RCRA § 3001(i), 42 U.S.C. § 6921(i). This provision reads as follows:

(i) Clarification of household waste exclusion

Because this provision did not explicitly mention incinerator ash, the regulatory treatment of ash has continued to be a controversial issue.<sup>16</sup>

In *City of Chicago v. Environmental Defense Fund, Inc.*,<sup>17</sup> the Supreme Court interpreted the clarification provision to require regulation of incinerator ash under Subtitle C. Prior to *Chicago*, most incinerator operators handled incinerator ash under Subtitle D.<sup>18</sup> This decision will now require testing of incinerator ash and, if the ash proves to be hazardous, compliance with Subtitle C.<sup>19</sup>

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A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if —

- (1) such facility
  - (A) receives and burns only —
    - (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
    - (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
  - (B) does not accept hazardous wastes identified or listed under this section, and
- (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

*Id.*

16. For additional information concerning this controversy, see *supra* notes 26-58 and accompanying text.

17. 114 S. Ct. 1588 (1994).

18. See *supra* note 10 and accompanying text. Although RCRA is less stringent, there are a few states that required incinerators to handle incinerator ash in accord with Subtitle C prior to the *Chicago* decision. See, e.g., *South Carolina Communities Develop 20-Year Waste Management Plans*, SOLID WASTE REPORT, Sept. 29, 1994, at 38 (South Carolina's two incinerators already tested their ash prior to *Chicago*).

19. DeLong, *supra* note 2, at 10,536. If the ash contains levels of toxic constituents in excess of the limits set by EPA, then the incinerator ash must be treated to neutralize its hazardous constituents and then disposed of in a hazardous waste landfill. *Id.* at 6.

Nowhere in RCRA or EPA's regulations is there an explicit requirement for testing. MANAGING ASH, *supra* note 1, at 19. However, the regulations state that if the waste is neither exempt from Subtitle C under an enumerated exclusion, nor listed in the regulations as a hazardous waste, then the waste generator is responsible for making the determination of whether the waste is hazardous. *Id.* "This determination is made by either testing the waste or '[a]pplying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.'" *Id.* (quoting 40 C.F.R. § 262.11(c)(2) (1994)). Therefore, prior to the *Chicago* decision, incinerator operators applied their knowledge of the "household waste exclusion" to conclude that incinerator ash did not need to be tested. See *id.* at 19-20.

The test required by EPA is called the Toxicity Characteristic Leaching Procedure ("TC") test. DeLong, *supra* note 2, at 3; see also 40 C.F.R. § 261, App. II (1994). This test is designed to simulate the conditions in a landfill to determine if the waste could become soluble and leach to the surrounding water supply. MANAGING ASH, *supra* note 1, at 20. Liquid extracts from the waste are tested for 40

In examining the *Chicago* decision, this Note will focus on the Supreme Court's interpretation of Congress' clarification of the household waste exclusion and its effects on waste-to-energy incineration as a means of municipal waste disposal.<sup>20</sup> Part II of this Note outlines RCRA, EPA's regulations, and the resulting circuit split regarding the regulatory treatment of incinerator ash.<sup>21</sup> Part III provides the factual setting of *Chicago* and a narrative analysis of the Supreme Court's reasoning, explaining how the Court arrived at its interpretation of the clarification provision.<sup>22</sup> Part IV critically analyzes the Court's rationale<sup>23</sup> and Part V discusses both the practical effects and legal implications of the Court's construction.<sup>24</sup> This Note concludes by calling for congressional action concerning the specific regulation of incinerator ash so that incineration may continue as a viable method of municipal waste disposal.<sup>25</sup>

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specific types of hazardous constituents, including lead and cadmium. See 40 C.F.R. § 261.24 (1994). If the extract contains constituents which exceed the maximum levels set by EPA, then the waste has exhibited a toxicity characteristic, and is classified as a hazardous waste. See *id.* Incinerator ash fails the TC test if it leaches lead or cadmium above levels set by EPA. 59 Fed. Reg. 29,374 (1994).

EPA developed the TC test to simplify its predecessor, the Extraction Procedure ("EP") Toxicity test. MANAGING ASH, *supra* note 1, at 4. For a comparison of the TC test and its predecessor, the EP Toxicity test to analyze incinerator ash, see generally MANAGING ASH, *supra* note 1, at 3-4, 16-21.

Laboratory tests using the EP Toxicity test produced the following results: some bottom ash samples tested below the limit for lead and all bottom ash samples tested below the limit for cadmium while combined ash samples (bottom and fly ash) largely exceeded the limits for lead, but not for cadmium. *Id.* at 3-4. For the distinction between bottom and fly ash, see *supra* note 7.

20. This Note does not argue that the benefits of incineration as a means of waste disposal outweigh any environmental costs that may result from incineration. Rather, this Note provides an analysis of the Court's interpretation of the clarification provision and how the *Chicago* decision will affect incineration. For a policy based argument that Congress' clarification of the "household waste exclusion" requires that incinerator ash be regulated as a hazardous waste, see generally Rutt, *supra* note 14 (analyzing jurisdictional split concerning regulation of incinerator ash and concluding that ash was intended to be regulated as hazardous waste).

21. For the discussion of the legislative and administrative history of incinerator ash, see *infra* notes 26-72 and accompanying text.

22. For the discussion of the Supreme Court's decision in *Chicago*, see *infra* notes 73-118 and accompanying text.

23. For the critical analysis of the Supreme Court's reasoning in *Chicago*, see *infra* notes 119-45 and accompanying text.

24. For the discussion of the impact of the *Chicago* decision, see *infra* notes 146-59 and accompanying text.

25. See *infra* note 161 and accompanying text.

## II. BACKGROUND

### A. Legislation and Administrative Regulations

#### 1. *Resource Conservation and Recovery Act of 1976*

RCRA governs the disposal of municipal waste.<sup>26</sup> Enacted by Congress in 1976, RCRA delegates extensive authority to EPA to regulate solid waste disposal.<sup>27</sup> Subtitle D of RCRA provides for

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26. RCRA §§ 3001-5006, 42 U.S.C. §§ 6901-91.

27. RCRA was Congress' response to the country's dwindling landfill capacity and the threat of landfiling hazardous wastes. Hillary A. Sale, Note, *Trash, Ash, and Interpretation of RCRA*, 17 HARV. ENVTL. L. REV. 409, 411 (1993). RCRA's two primary objectives are to "promote the protection of health and the environment and to conserve valuable material and energy resources . . ." RCRA § 1003, 42 U.S.C. § 6902(a).

These goals are based on congressional findings concerning solid waste, environment and health, materials, and energy. These findings are enumerated in the statute as follows:

- (a) Solid waste. The Congress finds with respect to solid waste—
- (1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;
  - (2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;
  - (3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;
  - (4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.
- (b) Environment and Health. The Congress finds with respect to the environment and health, that—
- (1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
  - (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
  - (3) as a result of the Clean Air Act [42 U.S.C. § 7401 et seq.], the Water Pollution Control Act [33 U.S.C. § 1251 et seq.], and other Federal and

state regulation of non-hazardous solid waste under federal guidelines.<sup>28</sup> If a solid waste is deemed to be hazardous under established EPA guidelines, then such waste becomes subject to regulations under Subtitle C.<sup>29</sup>

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State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials. The Congress finds with respect to materials, that—

(1) millions of tons of recoverable material which could be used are needlessly buried each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) Energy. The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

*Id.* § 1002, 42 U.S.C. § 6901.

28. RCRA §§ 4001-09, 42 U.S.C. §§ 6941-49.

29. *Id.* §§ 3001-11, 42 U.S.C. §§ 6921-34. Under section 6921(a), EPA is required to "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste . . . ." *Id.* § 3001(a), 42 U.S.C. § 6921(a). Based on these criteria, EPA is then required to "promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes . . . which shall be subject to the provisions of [Subtitle C]." *Id.* § 3001(b), 42 U.S.C. § 6921(b)(1). For a discussion of the procedures used to test for listed hazardous constituents, see *supra* note 19.



## 2. Exemptions from Subtitle C Regulation

In 1980, EPA promulgated regulations for hazardous and non-hazardous waste pursuant to RCRA's classification.<sup>30</sup> There are two methods of identifying a hazardous waste under these regulations. First, the regulations list certain wastes that are inherently hazardous due to their composition.<sup>31</sup> Second, even if a waste does not appear on this list, it may still be subject to hazardous waste regulation if it exhibits certain characteristics.<sup>32</sup> Even when a material is determined hazardous by one of the above methods, EPA provides exemptions for certain materials from Subtitle C regulation.<sup>33</sup> Therefore, although a material may exhibit characteristics that would otherwise require hazardous waste classification, it still may escape Subtitle C regulation.

One of these exemptions, the "household waste exclusion,"<sup>34</sup> is at the heart of the dispute as to whether incinerator ash is to be regulated as a hazardous waste. This exclusion releases municipalities and households from the requirements of Subtitle C with respect to the disposal of household waste.<sup>35</sup> Because household

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In addition, those materials which are classified as hazardous must come within the definition of "hazardous waste" as set out by RCRA:

The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
- (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

RCRA § 1004(5), 42 U.S.C. § 6903(5).

30. RCRA directs EPA to classify solid waste as either hazardous or non-hazardous and to establish controls over the disposition of these wastes pursuant to this classification. See RCRA § 3001, 42 U.S.C. § 6921.

31. 40 C.F.R. § 261.30-33(f) (1994).

32. These characteristics are listed as follows: ignitability, corrosivity, reactivity or toxicity. 40 C.F.R. § 261.21-24 (1994).

For an explanation of the testing procedures EPA has devised to determine if these characteristics are present, see *supra* note 19.

33. These exemptions, or exclusions, from Subtitle C regulation are listed at 40 C.F.R. § 261.4 (1994).

Included in the list of exempted materials are the following: "agricultural wastes, mining wastes, ash from coal or other fossil-fuel combustion, and small-quantity generator wastes." MANAGING ASH, *supra* note 1, at 15. Household wastes are also exempt from Subtitle C regulation. *Id.*

34. The original exemption promulgated by EPA appeared at 45 Fed. Reg. 33,120 (1980) (codified as amended at 40 C.F.R. 261.4(b)(1) (1994)). This exemption is commonly referred to as the "household waste exclusion." For the text of this exclusion, see *supra* note 14.

35. For an explanation of what constitutes "household waste," see *supra* note 14.

waste contains small quantities of hazardous waste constituents as well as metals that may become hazardous after burning, the "household waste exclusion" is essential in exempting municipalities from the stringent requirements of Subtitle C regulation.<sup>36</sup>

After incineration, toxic concentrations of lead and cadmium have been found in the resulting incinerator ash.<sup>37</sup> If residual incinerator ash is not properly handled, its toxic constituents may leach into surrounding groundwater or surface water supplies.<sup>38</sup> The preamble to the 1980 regulations explicitly directed that the household waste exemption be applied to "treatment residuals," such as ash resulting from the burning of household waste.<sup>39</sup> However, ambiguity still existed because it was not clear whether the ash resulting from the burning of household waste combined with industrial non-hazardous waste fell within the "household waste exclusion."<sup>40</sup>

This uncertainty regarding the regulation of incinerator ash led Congress to enact the "Clarification of the Household Waste Exclusion," a 1984 amendment to RCRA.<sup>41</sup> This clarification provided that a waste-to-energy incinerator that burns only household waste and non-hazardous commercial and industrial waste will not be subject to hazardous waste regulation requirements of "treating, storing, disposing of, or otherwise managing hazardous wastes."<sup>42</sup> This exemption would apply as long as incinerators had procedures

36. See *supra* note 14 and accompanying text. Household waste contains metals which may not be hazardous when burned but, after the incineration process, become concentrated at toxic levels. MANAGING ASH, *supra* note 1, at 2.

37. MANAGING ASH, *supra* note 1, at 2, 9. See *supra* note 19.

38. MANAGING ASH, *supra* note 1, at 2.

39. 45 Fed. Reg. 33,099 (1980). This preamble stated in relevant part that "residues remaining after treatment (e.g. incineration, thermal treatment) [of household waste] are not subject to regulation as a hazardous waste." *Id.*

40. See DeLong, *supra* note 2, at 4.

41. RCRA § 3001(i), 42 U.S.C. § 6921(i) [hereinafter referred to as the "Clarification Provision"]. For the text of this provision, see *supra* note 15. This provision was part of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221.

42. Jane Ellen Warner, *The Household Waste Exclusion Clarification*; 42 U.S.C. Section 6921(i): *Did Congress Intend to Exclude Municipal Solid Waste Ash from Regulation as Hazardous Waste Under Subtitle C?*, 16 W. NEW ENG. L. REV. 149, 150 (1994) (footnote omitted).

RCRA provides statutory definitions of the different activities which are enumerated in the clarification provision, namely "treatment," "storage," "disposal," and "hazardous waste management". See RCRA § 1004, 42 U.S.C. § 6903. These terms are defined as follows:

As used in this chapter:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any

in place that insured hazardous commercial and industrial wastes were not being received along with the household and non-hazardous commercial wastes.<sup>43</sup> Although this provision expanded the exemption to cover waste-to-energy facilities burning household wastes and non-hazardous commercial wastes, Congress failed to specifically mention ash residue.<sup>44</sup> The legislative history to this amendment indicated, however, that all activities of a waste-to-energy facility were covered by the exclusion.<sup>45</sup>

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constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

...  
(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

...  
(33) The term "storage," when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

...  
(34) The term "treatment," when used in connection with hazardous waste, means any method, technique, or process, . . . designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste non-hazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it non-hazardous.

*Id.*

The statute does not explicitly define the phrase "otherwise managing." The term "hazardous waste management" has been used by some courts as a substitute. *See, e.g.,* Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc., 725 F. Supp. 758, 764 n.13 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991).

For a discussion of these definitions with respect to the *Chicago* Court's statutory interpretation of the clarification provision, see *infra* notes 98-102, 121-27 and accompanying text.

43. RCRA § 3001(i)(2), 42 U.S.C. 6921(i)(2).

44. Compare *supra* note 14 (providing text of "household waste exclusion") with *supra* note 15 (providing text of "clarification of household waste exclusion").

45. S. REP. NO. 284, 98th Cong., 2d Sess. 61 (1983). The Senate Committee on Environment and Public Works commented on the proposed clarification with respect to these activities, stating that the entire waste stream was excluded from hazardous waste regulation. *Id.* (waste stream refers to the management of waste from its source to its final disposal). The Senate Committee's comments read as follows:

The reported bill adds a subsection (d) to section 3001 [codified at 42 U.S.C. § 6921(i)] to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose waste are sufficiently similar in both quantity and quality to those of households.

Following Congress' adoption of the clarification provision, EPA promulgated a regulation that codified the clarification provision.<sup>46</sup> This regulation textually mirrored the RCRA clarification provision.<sup>47</sup> In its preamble to the regulation, EPA stated that it interpreted the statute and the rule to exempt incinerator facilities, but not incinerator ash, from Subtitle C regulation.<sup>48</sup> However, at

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Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) [42 U.S.C. § 6921(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under 3001 [section 3001 codified at 42 U.S.C. § 6921].

Second, such facilities cannot accept hazardous wastes identified or listed under section 3001 [42 U.S.C. § 6921] from commercial or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste.

*Id.*

The House Conference Committee adopted the amendment exactly as it was set forth by the Senate Committee. H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 79, 106 (1984), *reprinted in* 1984 U.S.C.A.N. 5576, 5649, 5677. The House Committee's Report stated the following with respect to the clarification provision: "The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." *Id.* With respect to the purposes of RCRA generally, the Committee Report expressed the Conferees intent that "advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal." H.R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 79, 80 (1984).

46. 40 C.F.R. § 261.4(b)(1) (1994).

47. For the text of the clarification provision, see *supra* note 15.

48. The preamble to these regulations reads as follows:

The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are haz-

the time these regulations were promulgated, EPA did not announce whether incinerator operators were required to obtain hazardous waste permits as required by Subtitle C.<sup>49</sup>

EPA issued varying interpretations of the clarification provision for the remainder of the decade.<sup>50</sup> The agency vacillated between the view that ash should be regulated as a hazardous waste if it exhibits hazardous waste characteristics and the view that Congress never intended to regulate incinerator operators under the stringent provisions of Subtitle C.<sup>51</sup> Just prior to the Supreme Court's decision in *Chicago*,<sup>52</sup> in an internal memorandum issued in September, 1992, EPA Administrator Reilly declared incinerator ash to

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ardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question, although the Senate Report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of [the clarification provision] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste. However, EPA has no evidence to indicate that these ash residues are hazardous under existing rules. EPA does not believe the HSWA [Hazardous and Solid Waste Amendments of 1984 containing the clarification provision] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed. Reg. 28,702, 28,725-26 (1985).

49. *Id.* For commentary detailing EPA's inconsistent statements regarding incinerator ash within the RCRA regulations, see Sale, *supra* note 27, at 415-18 (explaining EPA's cautious yet confused approach to incinerator ash immediately following Congress' enactment of clarification provision).

50. For a detailed account of EPA's wavering position on the status of incinerator ash, see MANAGING ASH, *supra* note 1, at 15-16. See also Rutt, *supra* note 14, at 214-15; Warner, *supra* note 42, at 156-58; Sale, *supra* note 27, at 415-18; 59 Fed. Reg. 29,374 (1994).

51. For an explanation of EPA testing procedure with respect to incinerator ash, see *supra* note 19.

52. For a discussion of the Court's decision in *Chicago*, see *supra* notes 87-118 and accompanying text.

be exempt from Subtitle C regulation.<sup>53</sup> This pronouncement came after the regulation of incinerator ash had been considered by both the Second and Seventh Circuits.<sup>54</sup>

A resolution of the incinerator ash problem also continued to elude Congress. After enactment of the 1984 clarification provision, numerous bills were proposed that would have explicitly exempted incinerator ash from Subtitle C regulation.<sup>55</sup> None of these bills ever became law.<sup>56</sup> In the 1990 Clean Air Act Amendments, Congress established a two year moratorium on the regulation of ash as a hazardous waste under RCRA.<sup>57</sup> Since this moratorium, there has been no legislation regarding the regulatory treatment of incinerator ash.<sup>58</sup>

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53. Memorandum Issued by Administrator of EPA, William K. Reilly re: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation under RCRA Section 3001(i), September 18, 1992 [hereinafter *Memorandum*]. The United States Court of Appeals for the Seventh Circuit considered this memorandum to be only another policy change to add to a long history of waffling by EPA. See *Environmental Defense Fund v. City of Chicago*, 985 F.2d 303, 304 (7th Cir. 1993) (considering incinerator ash issue on remand in light of September, 1992 EPA memorandum), *cert. granted*, 113 S. Ct. 2992 (1993), *aff'd*, 114 S. Ct. 1588 (1994).

54. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies*, 931 F.2d 211 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 453 (1991); *Environmental Defense Fund, Inc. v. City of Chicago*, 946 F.2d 345 (7th Cir. 1991).

55. See Warner, *supra* note 42, at 158 n.65 ("In the first three weeks of the first session of the 102nd Congress, over 11 amendments or reauthorization bills were introduced.") (citing Steve Johnson, *Recyclable Materials and RCRA's Complicated, Conflicting, and Costly Definition of Solid Waste*, 21 ENVTL. L. REP. (ENVTL. L. INST.) 10,357, 10,358 n.10 (July, 1991)); see also 59 Fed. Reg. 29,374 (1994) (describing regulatory and legislative developments concerning incinerator ash).

56. See Warner, *supra* note 42, at 158 n.64.

57. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, at 306 (expired 1992). The relevant text of this amendment reads as follows: "For a period of 2 years after the date of enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the [EPA] pursuant to section 3001 of the Solid Waste Disposal Act." *Id.*

The reasons Congress further delayed a decision on incinerator ash were not made entirely clear. Warner, *supra* note 43, at 158 nn. 64 & 66 and accompanying text. Nevertheless, it is presumed that the ongoing litigation was influential in Congress' decision to delay legislative action. See *id.* at 158 n.66 (expressing view that Congress may have been awaiting outcomes of *Wheelabrator* and *Chicago* litigation).

58. There have been bills proposed which would require testing of incinerator ash. See, e.g., H.R. Res. 2017, 103rd Cong., 1st Sess. (1993). However, none of these bills have been enacted.

## B. Adjudication of the Incinerator Ash Issue

Against this backdrop of legislative and regulatory confusion, the Environmental Defense Fund ("EDF")<sup>59</sup> brought companion lawsuits against two incinerator operators, the City of Chicago<sup>60</sup> and Wheelabrator Technologies, Inc.<sup>61</sup> In these lawsuits, EDF alleged that the defendants' handling of incinerator ash as a non-hazardous waste violated Subtitle C of RCRA.

The issue in both cases was one of statutory interpretation, namely, whether the clarification provision exempted the ash remaining after burning municipal solid waste from Subtitle C regulation.<sup>62</sup> The incinerator-operator defendants argued that the "household waste exclusion" exempted all activities of incinerator operators, including the disposal of the remaining ash, from the restrictive provisions of Subtitle C.<sup>63</sup> EDF argued that the exemption only applied to the treatment, storage and disposal of municipal solid waste itself, not the incinerator ash that remained after burning.<sup>64</sup>

In *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, the United States District Court for the Southern District of New York held incinerator ash to be exempt from Subtitle C regulation based on the legislative history of RCRA.<sup>65</sup> Examining the

59. The Environmental Defense Fund ("EDF") is a non-profit membership organization which "characterizes itself as 'a national environmental advocacy organization supported by the dues of 60,000 dues-paying members.'" *Wheelabrator* 725 F. Supp. at 761 (citing plaintiff's brief).

60. *Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated and remanded*, 113 S. Ct. 2992 (1992), *aff'd*, 985 F.2d 303 (7th Cir. 1993), *aff'd*, 114 S. Ct. 1588 (1994).

61. *Wheelabrator*, 725 F. Supp. at 758.

62. See RCRA § 3001(i), 42 U.S.C. § 6921(i). For the text of the clarification provision, see *supra* note 15.

63. See *Wheelabrator*, 725 F. Supp. at 764 (defendant, Wheelabrator Technologies, argued that "otherwise managing" language in clarification provision was broad enough to exempt all waste disposal activities of municipal incinerator operators); *Chicago*, 727 F. Supp. at 421 (Chicago contended "that the ash remaining after incineration at the Northwest facility is from a non-hazardous waste stream and thus exempt from hazardous waste regulation.").

64. See *Wheelabrator*, 725 F. Supp. at 763; *Chicago*, 727 F. Supp. at 420-21. In both cases, EDF alleged that incinerator ash is a hazardous waste and that the defendants "failed to comply with the cradle-to-grave regulatory system (Subtitle C) that governs storage, transport, disposal, and other handling of hazardous wastes." *Chicago*, 727 F. Supp. at 420-21; *Wheelabrator*, 727 F. Supp. at 760-61. EDF specifically argued in both cases based on the statutory definitions of the exempted activities in the clarification provision, asserting that none of these activities covered the "generation of hazardous waste." See *Wheelabrator*, 725 F. Supp. at 764 n.13; *Chicago*, 727 F. Supp. at 422.

65. *Wheelabrator*, 725 F. Supp. at 764-66. The court disagreed with both the plaintiff, EDF, and the defendant, Wheelabrator Technologies, stating that the lan-

Senate Report, the court determined that generating incinerator ash was exempted by the clarification provision.<sup>66</sup> The *Wheelabrator* court refused to defer to EPA's 1985 interpretation of the clarification provision because it was "in direct conflict with the expressed intent of Congress as . . . manifested in the legislative history."<sup>67</sup> On

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guage of the clarification provision was clear. *Id.* at 767-68 ("The very basic question of whether or not ash should be regulated under Subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute.").

66. *Wheelabrator*, 725 F. Supp. at 764-65. The court stated, "[t]he report . . . makes clear that the exclusion was meant to extend to ash and other wastes generated in the process of resource recovery. . . . The Senate report could not be more explicit." *Id.* at 765. For the text of this Senate report, see *supra* note 45.

67. *Id.* at 766. The EPA interpretation that the court was referring to was the 1985 preamble to EPA's regulations. For the text of this preamble, see *supra* note 48.

The court explained that an administrative agency's interpretation is normally entitled to deference but, in this case, that principle would not apply because EPA's interpretation conflicted with congressional intent as expressed in the statute's legislative history. *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)) (standing for the proposition that "an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.") Congressional intent was sufficiently clear in the legislative history so as to preclude the administrative agency's interpretation. *Id.* The court characterized EPA's interpretations as "internally inconsistent" and incomplete because EPA left open certain questions such as how incinerator ash was to be regulated if it was not a hazardous waste. *Id.* at 766 n.14.

Additionally, the *Wheelabrator* court noted that deference to an agency's interpretation of a statute is only appropriate if "Congress has not directly addressed the precise question at issue." *Id.* (quoting *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984)). Therefore, according to the court, the *Chevron* principles requiring judicial deference to an administrative agency's interpretation of a statute were not applicable here. See *id.*

In *Chevron*, the Supreme Court set forth the following principles:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Chevron*, 467 U.S. at 842-43 (footnotes omitted). The *Chevron* court also stated: [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citations omitted]. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

*Id.* at 843 n.9. For additional case law concerning the judicial review of an administrative agency's interpretation of a statute, see Ernest H. Schopler, Annotation,



appeal, the Second Circuit affirmed the district court holding that the incinerator ash could be disposed of as a non-hazardous waste.<sup>68</sup>

In *Environmental Defense Fund, Inc. v. City of Chicago*, the District Court for the Northern District of Illinois also held that incinerator ash was exempt from Subtitle C regulation.<sup>69</sup> On appeal, however, the Seventh Circuit reversed the district court, holding that incinerator ash was subject to Subtitle C regulation.<sup>70</sup>

These two lawsuits created a split in authority between the second and seventh circuits on the incinerator ash issue.<sup>71</sup> This conflict of authority posed potentially serious problems for incinerator operators across the country. While incinerators in the Seventh Circuit were required to dispose of their ash in accordance with the rigorous requirements of Subtitle C, those in the Second Circuit could dispose of their ash in standard non-hazardous waste landfills. Moreover, this circuit split created uncertainty for the incinerators in other areas of the country.<sup>72</sup> Therefore, it was incumbent upon the Supreme Court to resolve the issue of whether the ash remaining after the burning of municipal solid waste was regulated under Subtitle C of RCRA.

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*Supreme Court's View as to Weight and Effect to be Given, on Subsequent Judicial Construction, to Prior Administrative Construction of Statute*, 39 L. Ed. 2d 942 (1993).

68. *Wheelabrator*, 931 F.2d at 213. At the district court level, Judge Haight issued an opinion setting forth "his findings of fact and conclusions of law," prior to entering final judgment. *Id.* Subsequently, the district court decided to delay final judgment pending further discovery. Ultimately, the district court granted summary judgment for the defendant in an unreported opinion. See *Wheelabrator*, 931 F.2d at 212. EDF appealed this decision to the Second Circuit which affirmed the district court's judgment for the reasons stated in District Court Judge Haight's initial reported opinion, referring to that opinion as "thorough and well reasoned." *Id.* at 213 (citing *Wheelabrator*, 725 F. Supp. at 758).

The Supreme Court denied EDF's petition for writ of certiorari on November 18, 1991. *Wheelabrator* 112 S. Ct. at 453. For a thorough discussion and critique of the reasoning of the *Wheelabrator* court, see Rutt, *supra* note 14, at 212-19.

69. *Chicago*, 727 F. Supp. at 424. The court granted the city's motion for summary judgment. *Id.*

70. *Chicago*, 948 F.2d at 352. For a discussion of the Seventh Circuit's reasoning, see *infra* note 82 and accompanying text.

71. For a detailed discussion of both of these cases and the jurisdictional split they created, see Rutt, *supra* note 14.

72. There were concerns that if incinerator ash were adjudicated to be a hazardous waste, there might be retroactive liability for the period of time that ash was disposed of in non-hazardous waste landfills. See *infra* note 155 and accompanying text.

III. *CITY OF CHICAGO v. ENVIRONMENTAL DEFENSE FUND, INC.*

## A. Facts and Procedural History

Since 1971, the City of Chicago owned and operated a municipal solid waste resource recovery facility, the Northwest Waste-to-Energy Facility.<sup>73</sup> This incinerator burned municipal solid waste for the recovery of energy, leaving an ash residue.<sup>74</sup> When the municipal waste was received at the facility, it consisted of regular household waste and non-hazardous commercial waste.<sup>75</sup> After this waste was burned by the facility, the remaining ash was taken to landfills that were not licensed to receive hazardous waste.<sup>76</sup> EDF alleged that this ash contained toxic levels of lead and cadmium, which are hazardous wastes under RCRA.<sup>77</sup> Neither Chicago, nor the waste hauler who transported the ash, applied for or received an EPA identification number as required by Subtitle C of RCRA for those who handle hazardous wastes.<sup>78</sup>

EDF brought an action against the City of Chicago in the District Court for the Northern District of Illinois, alleging that Chicago violated Subtitle C of RCRA by disposing of incinerator ash as a non-hazardous waste.<sup>79</sup> Chicago filed a motion for summary judgment on the grounds that its municipal incinerator was exempted from Subtitle C under the "household waste exemption."<sup>80</sup> The district court granted Chicago's motion for summary judgment, agreeing that the clarification provision exempted the incinerator ash from Subtitle C.<sup>81</sup>

On appeal, the Seventh Circuit Court of Appeals reversed the district court, holding that the incinerator ash was subject to Subtitle C regulation as a hazardous waste.<sup>82</sup> In February, 1992, Chicago

73. *Chicago*, 114 S. Ct. at 1589.

74. *Id.* The facility burns approximately 350,000 tons of solid waste annually while producing energy which is used by the facility itself and sold to outsiders. *Id.*

75. Respondents Brief, at 9, *Environmental Defense Fund, Inc. v. City of Chicago*, 114 S. Ct. 1588 (1994) [hereinafter Respondents' Brief].

76. Respondents' Brief, *supra* note 75, at 10.

77. *Id.* at 9; see also *Chicago*, 114 S. Ct. at 1589. The City did not contest EDF's claim that the ash contained hazardous constituents, Respondents' Brief, at 9, nor did it contest the claim that it was not complying with Subtitle C requirements. *Chicago* 114 S. Ct. at 1589.

For an explanation of the toxicity of lead and cadmium, see *supra* note 8.

78. Respondents' Brief, *supra* note 75, at 10.

79. *Chicago*, 114 S. Ct. at 1589.

80. *Id.* For the text of the clarification provision, see *supra* note 15.

81. *Chicago*, 114 S. Ct. at 1589-90.

82. *Chicago*, 948 F.2d at 352. The court reasoned that "[i]t does not follow that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Con-

petitioned the United States Supreme Court for a writ of certiorari. Pending this petition, EPA Administrator Reilly issued an internal memorandum instructing Regional EPA Administrators to treat incinerator ash as exempt from RCRA Subtitle C regulation.<sup>83</sup> The Supreme Court subsequently granted the city's petition, vacated the decision of the Seventh Circuit and remanded the case for reconsideration in light of the EPA's newly expressed position.<sup>84</sup> On remand, the Seventh Circuit reinstated its previous opinion.<sup>85</sup>

The City once again petitioned the Supreme Court for a writ of certiorari. The writ was granted and, on a vote of 7-2, the Supreme Court affirmed the Seventh Circuit's holding that the clarification provision does not exempt incinerator ash from Subtitle C regulation.<sup>86</sup>

## B. The Majority Opinion

The Supreme Court at last ruled on the question of whether incinerator ash was exempted from Subtitle C regulation.<sup>87</sup> Faced with an issue of statutory interpretation, the Court primarily based its construction of the clarification provision on what it called the "plain meaning" of the provision's language.<sup>88</sup>

### 1. Plain Meaning

EDF argued that while the plain language of the clarification provision exempts the receipt and incineration of municipal solid waste from Subtitle C regulation, the generation of the remaining ash is not included in this exemption.<sup>89</sup> The petitioner, the City of

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gress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste." *Id.* at 351.

The court also emphasized that the term "generation" was not included in the definition of hazardous waste management. *Id.* at 352.

83. *Memorandum*, *supra* note 53.

84. *See Chicago v. Environmental Defense Fund, Inc.*, 113 S. Ct. 486 (1992).

85. *Chicago*, 985 F.2d at 304. The Seventh Circuit discounted the memorandum, stating, "EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers." *Id.*

86. *Chicago*, 114 S. Ct. at 1594. Justice Scalia delivered the majority opinion. Justice Stevens was joined by Justice O'Connor in the dissenting opinion. *Id.* at 1589.

87. *Id.* at 1588.

88. *Id.* at 1591. For the text of the clarification provision, see *supra* note 15.

89. Respondents' Brief, *supra* note 75, at 12. EDF also argued that Chicago's proposed construction of the clarification provision cannot be squared with the structure and purpose of RCRA because, under RCRA, Congress subordinated the promotion of incinerators to environmental protection. *Id.* EDF rejected the use

Chicago, also urged the Court to examine the plain language of the clarification provision.<sup>90</sup> Chicago maintained that the language exempts all waste management activities of a resource recovery facility from Subtitle C regulation, including the generation of ash.<sup>91</sup>

The Court began its analysis by looking at the original household waste exclusion in the 1980 EPA regulations.<sup>92</sup> The Court acknowledged that under this exclusion, an incinerator burning only household waste can dispose of its ash as non-hazardous waste, noting, however, that Chicago did not limit its incinerator to the burning of household waste.<sup>93</sup> Therefore, the Court concluded that EPA's 1980 regulations did not exempt Chicago's facility from Subtitle C regulation if the ash was sufficiently toxic.<sup>94</sup>

The Court did not seek any guidance on the interpretation of the clarification provision from EPA or its regulations. There was no deference given to EPA's interpretation of the statute under the principles established by *Chevron U.S.A. Inc. v. Natural Resources De-*

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of the legislative history in the interpretation of the statute because it contended that legislative history cannot be used to add to a statute language that has clearly been omitted. *Id.* EDF asserted that no deference should be given EPA's latest position on incinerator ash because congressional intent was clear. *Id.* at 12-13.

90. Brief for Petitioners, Environmental Defense Fund, Inc. v. City of Chicago, 114 S. Ct. 1588 (1994) [hereinafter Petitioners' Brief]. Chicago also argued that the clarification provision's legislative history evinced Congress' intent to exempt all activities of municipal waste incinerators. *Id.* at 13; see *supra* note 45 and accompanying text. Additionally, Chicago contended that exempting ash is consistent with RCRA as a whole and the objectives behind it as evidenced by the congressional findings enumerated by the statute. Petitioners' Brief, *supra*, at 12; see *supra* note 27 and accompanying text.

In the alternative, Chicago argued that if the Court were to find the clarification ambiguous, the Court should defer to EPA's interpretation of the statute as set forth in EPA's September, 1992 internal memorandum. Petitioners' Brief, *supra*, at 13; see *supra* note 53 and accompanying text.

91. Petitioners' Brief, *supra* note 90, at 11. This argument was based on the statutory definitions provided in RCRA. See *supra* note 42 and accompanying text.

92. *Chicago*, 114 S. Ct. at 1590-91. For the text of this regulation, see *supra* note 14.

The Court briefly described EPA's stringent Subtitle C requirements. *Chicago*, 114 S. Ct. at 1590. Hazardous waste generators and transporters are required "to comply with handling, record-keeping, storage, and monitoring requirements." *Id.* (citing 40 C.F.R. § 262 (1993)). Owners and operators of hazardous waste treatment, storage, and disposal facilities ("TSDF's"), however, are held to even more stringent standards, "including a 4-to-5 year permitting process." *Id.* at 1590 (citing RCRA §§ 3002-05, 42 U.S.C. §§ 6922-25). For a general discussion of RCRA, see *supra* notes 26-29 and accompanying text.

93. *Chicago*, 114 S. Ct. at 1591.

94. *Id.* (citing 40 C.F.R. §§ 261.3, 261.24 (1993)). The Court stated that if the ash tested pursuant to EPA regulations were found to be toxic, Chicago's facility would be deemed a hazardous waste generator for purposes of regulation. *Id.* The Court noted that the facility would still not be designated a TSDF because all incoming waste would still be classified as non-hazardous. *Id.*

*fense Council, Inc.*,<sup>95</sup> because in the Court's opinion, EPA's interpretation went "beyond the scope of whatever ambiguity" the clarification contained.<sup>96</sup>

The Court then examined the language of the clarification provision, concluding that there was no express support for Chicago's claim that this language exempted the incinerator's entire waste stream from Subtitle C regulation.<sup>97</sup> In addressing Chicago's arguments, the Court repeatedly referred back to this conclusion.

## 2. Statutory Definitions

Next, the Court looked at the statutory definitions of the activities exempted by the clarification provision.<sup>98</sup> Chicago contended that application of RCRA's statutory definitions to the terms used in the clarification provision indicated that every activity of a resource recovery facility was covered by the exemption.<sup>99</sup> However, the Court adopted a different analysis of the RCRA definitions. In agreeing with EDF, the Court described incineration that leaves ash containing toxic constituents as "hazardous waste generation," a term defined by RCRA<sup>100</sup> but conspicuously omitted from the category of exempted activities under the clarification provision.<sup>101</sup> Relying on this omission, the Court reasoned that the plain language

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95. 467 U.S. 837 (1984). For an application of *Chevron* to the *Chicago* case, see *supra* note 67.

96. *Chicago*, 114 S. Ct. at 1594; see also *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 531 (1993) (declining to defer to administrative agency's interpretation because it exceeded scope of available ambiguity).

97. *Chicago*, 114 S. Ct. at 1591. The Court stated that since incinerator ash is not mentioned in the clarification provision, the household waste exemption applies only to municipal waste facilities, but does not extend to incinerator ash. *Id.*

The Court then compared the clarification provision to the 1980 regulations, where the preamble explicitly provided that ash residue was exempt. *Id.* at 1591-92. This distinction, along with the statute's "express national policy," provided further support for the Court's conclusion that ash which is toxic cannot be disposed of in non-hazardous waste landfills. *Id.*

98. *Chicago*, 114 S. Ct. at 1592. For the text of these definitions, see *supra* note 42.

99. Petitioners' Brief, *supra* note 90, at 12. "Everything that a resource recovery facility does to the municipal waste it burns [storing, treating, managing, collecting, transporting, or disposal] is covered by the words found in [the clarification provision]." *Id.*

100. *Chicago*, 114 S. Ct. at 1592. RCRA defines "hazardous waste generation" as "the act or process of producing hazardous waste." RCRA § 1004(6), 42 U.S.C. § 6903(6).

101. *Chicago*, 114 S. Ct. at 1592-93.

of the clarification provision did not exempt incinerator ash from Subtitle C regulation.<sup>102</sup>

### 3. *Legislative History*

Chicago argued that the legislative history of the clarification provision clearly supported its position that all activities engaged in by resource recovery facilities were exempt.<sup>103</sup> The Court briefly addressed and rejected this argument, stating that "it is the statute and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation."<sup>104</sup>

In addressing Chicago's argument that EDF's interpretation would turn the clarification into an "empty gesture," the Court stated that the clarification, interpreted not to exempt ash, accomplished two things.<sup>105</sup> First, the clarification codified an exemption

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102. *Id.* The Court determined that the term "otherwise managing" did not include the activity of generating hazardous waste. *Id.* Because Congress failed to provide a statutory definition of "otherwise managing," the Court looked to an analogous term defined by RCRA. *Id.* (citing RCRA § 1004(7), 42 U.S.C. § 6903(7)). The Court noted that the definition of "hazardous waste management" does not include the generation of hazardous waste. *See* 42 U.S.C. § 6903(7). For the text of this definition, see *supra* note 42.

103. *Chicago*, 114 S. Ct. at 1593. Chicago relied on Senate Report No. 98-284 to demonstrate Congress' intention to promote resource recovery facilities by exempting all their activities from Subtitle C regulation. Petitioners' Brief, *supra* note 90, at 21-22 (citing S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983)).

104. *Chicago*, 114 S. Ct. at 1593. To further support the contention that Congress would have included the word "generating" in the statute if incinerator ash was to be exempted, the Court cited an example of an exemption in RCRA which explicitly included references to generating. *Id.* at 1593 (citing Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 124(b), 100 Stat. 1689 (amending 42 U.S.C. § 6921)).

Superfund legislation was amended to read that an "owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, generating, transporting, treating, storing, or disposing of hazardous . . . wastes within the meaning of Subtitle C." *Id.* The Court quoted a recent decision: "'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'" *Id.* at 1593 (quoting *Keene Corp. v. United States*, 113 S. Ct. 2035, 2040 (1993)). Based on this reasoning, the Court concluded that when Congress intends to exempt an activity from regulation, Congress knows exactly how to do it. *Id.*

105. *Id.* *See* Petitioners' Brief, *supra* note 90, at 20. Ash residue is the only waste disposed of in large quantities, and is the only potentially hazardous waste that is collected, stored and disposed of by resource recovery facilities. *Id.* Incoming household waste is already exempt from Subtitle C regulation because of EPA's "household waste exclusion." *Id.*; *see supra* note 14 and accompanying text. As applied to resource recovery facilities, "the only meaningful exemption [the clarification provision] provides is an exemption for the ash remaining after incineration." Petitioners' Brief, *supra* note 90, at 12.

that had previously been subject to revision.<sup>106</sup> Second, it restricted the exemption to waste not generated by incinerators.<sup>107</sup>

The Court also rejected Chicago's contention that construing the clarification provision not to cover incinerator ash rendered the provision ineffective for the intended purpose of promoting resource recovery facilities.<sup>108</sup> The Court reasserted its determination that Chicago's facility was a "hazardous waste generator," and that hazardous waste generation is distinct from hazardous waste management.<sup>109</sup>

#### 4. RCRA Policy Objectives

The Court treated RCRA's two main goals of encouraging resource recovery and protecting against contamination as conflicting, explaining that it "is not unusual for legislation to contain diverse purposes that must be reconciled."<sup>110</sup> According to the Court, resolution of this conflict could be accomplished solely by a reading of the enacted text.<sup>111</sup> Thus, reference to any source outside the statute, including EPA's stated position and the legislative history, was not necessary.<sup>112</sup> For the foregoing reasons, the Court declined to interpret the provision to permit incinerator ash to be regulated as a non-hazardous waste.

#### C. Justice Stevens' Dissenting Opinion

Justice Stevens concluded that incinerator ash was not intended to be regulated as a hazardous waste, focusing on the purpose of the clarification provision as indicated by the regulatory and legislative history of incinerator ash.<sup>113</sup> Because he found ambiguity in the text of the clarification provision, Stevens gave defer-

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106. *Chicago*, 114 S. Ct. at 1593.

107. *Id.*

108. *Id.*; see also Petitioners' Brief, *supra* note 90, at 18. The City of Chicago relied on RCRA's statement of objectives and the congressional findings upon which the objectives were based in asserting that Congress intended, through RCRA, to encourage resource recovery facilities. *Id.* For the text of these provisions, see *supra* note 27.

109. *Chicago*, 114 S. Ct. at 1593-94. If, according to the Court's construction, the incinerator was deemed to be managing incinerator ash, the exemption would then apply.

110. *Id.* For the two goals of RCRA, see *supra* note 27.

111. *Chicago*, 114 S. Ct. at 1593-94.

112. *Id.* For the Court's treatment of EPA's interpretation of the clarification provision, see *supra* notes 95-96 and accompanying text.

113. *Chicago*, 114 S. Ct. at 1596, 1598 (Stevens, J., dissenting).

ence to both the Senate Report and EPA's stated position on incinerator ash.<sup>114</sup>

Based on the Senate Committee's Report,<sup>115</sup> the dissent concluded that the clarification provision was intended solely to clarify the "household waste exclusion's" applicability to non-hazardous waste from sources other than households, namely commercial and industrial non-hazardous wastes.<sup>116</sup> The dissent also deferred to EPA's interpretation of the clarification provision.<sup>117</sup> Given the am-

114. *Id.* at 1596-98 (Stevens, J., dissenting). Justice Stevens even suggested that the clarification provision was more ambiguous than the legislation it was designed to clarify. "The relevant statutory text is not as unambiguous as the Court asserts." *Id.* at 1597 (Stevens, J., dissenting).

Justice Stevens regarded the September, 1992 Memorandum as EPA's last stated position. *Id.* at 1598 n.12 (Stevens, J., dissenting); see *Memorandum*, *supra* note 53.

115. For the text of the Senate report, see *supra* note 45.

116. *Chicago*, 114 S. Ct. at 1595-97 (Stevens, J., dissenting). Justice Stevens first examined EPA's 1980 household waste exclusion and ascertained the need for a clarification. *Id.* at 1595 (Stevens, J., dissenting). Following from this need, along with the Senate Report's indication that the exclusion was not intended to be narrowed, Justice Stevens inferred that Congress, at a minimum, intended to retain the exemption provided in the 1980 regulation. *Id.* at 1595-97 (Stevens, J., dissenting). The House Committee Report provided further confirmation of this intent. *Id.* at 1597 (Stevens, J., dissenting). For the text of the House Committee Report, see *supra* note 45. Justice Stevens commented on this legislative history:

Given this commentary, it is quite unrealistic to assume that the omission of the word "generating" from the particularized description of management activities in the statute was intended to render the statutory description any less inclusive than either the 1980 regulation or the Committee Report. It is even more unrealistic to assume that legislators voting on the 1984 amendment would have detected any difference between the statutory text and the Committee's summary just because the term "generating" does not appear in the 1984 amendment. A common-sense reading of the statutory text in the light of the Committee Report and against the background of the 1980 regulation reveals an obvious purpose to preserve, not change, the existing rule.

*Chicago*, 114 S. Ct. at 1596-97 (Stevens, J., dissenting).

The dissent also noted that inclusion of the word "clarification" in the name of Congress' enacted provision, as opposed to a term such as "repeal or modification," was an indication of Congress' intent to retain the general parameters of the 1980 exclusion. *Id.* at 1596, 1598 (Stevens, J., dissenting).

117. *Chicago*, 114 S. Ct. at 1598 (Stevens, J., dissenting). The dissent did acknowledge that there had been "some ambivalence in EPA's views but recognized that there was no ambiguity or equivocation in either its [EPA's] original or its present interpretation of the Act." *Id.* at 1598 n.12 (Stevens, J., dissenting).

Justice Stevens also explained that although the majority's holding may "represent sound policy," this decision may be beyond the scope of the Court's function. *Id.* at 1598 (Stevens, J., dissenting). The question of whether "environmental benefits may . . . justify the costs of such additional regulation are questions of policy that we [the Court] are not competent to resolve." *Id.* (Stevens, J., dissenting). These questions are "precisely the kind that Congress has directed the EPA to answer." *Id.* (Stevens, J., dissenting).



biguous nature of the clarification provision and the legislative and regulatory history of RCRA, this interpretation was reasonable.<sup>118</sup>

#### IV. CRITICAL ANALYSIS: *CITY OF CHICAGO V. EDF*

##### A. The Supreme Court's Treatment of the Language of the Clarification Provision

The *Chicago* Court erred in treating the language of the clarification provision as unambiguous.<sup>119</sup> The language of this provision, contrary to its name, lacks clarity. The provision does not indicate whether a resource recovery facility is exempt from hazardous waste regulation before and/or after it receives and burns the household waste. Additionally, neither the words "ash residue" nor "ash" are mentioned in the statute. Finally, applying RCRA's statutory definitions to the text of the provision does not resolve the question of whether the remaining ash is exempt.<sup>120</sup>

In an effort to avoid the legislative history of the clarification provision, the *Chicago* Court focused on the statutory definitions of the activities enumerated in the provision.<sup>121</sup> The Court assumed that burning municipal solid waste falls within the statutory definition of "hazardous waste generation."<sup>122</sup> This assumption led the Court to incorrectly conclude that because the word "generating" is not included within the categories of exempted activities, incinerator ash is also not included in the exemption.<sup>123</sup>

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118. *Id.* (Stevens, J., dissenting). Based on the clarification's legislative history, "EPA could reasonably conclude, therefore, that to give any content to the statute with respect to this component of the waste stream [non-hazardous commercial and industrial waste], the incinerator ash must be exempted from Subtitle C regulation." *Id.* at 1597 (Stevens, J., dissenting).

Justice Stevens supports this construction by citing Judge Haight's opinion in *Wheelabrator*. *Id.* at 1598 (Stevens, J., dissenting) ("It is the construction that reasonable jurists have accepted.").

119. For the text of the clarification provision, see *supra* note 15.

120. Justice Stevens, in the dissent, finds ambiguity in the definition of "hazardous waste generation." *Chicago*, 114 S. Ct. at 1597 (Stevens, J., dissenting) (citing RCRA § 1004(6), 42 U.S.C. § 6903(6)).

121. These activities are the treating, storing, disposing of, or otherwise managing hazardous waste. RCRA § 3001(i), 42 U.S.C. § 6921(i). For the statutory definitions of these activities, see *supra* note 42.

122. For the statutory definition of "hazardous waste generation," see *supra* note 100.

123. Justice Stevens called this approach unrealistic in light of the legislative history of the clarification provision. *Chicago*, 114 S. Ct. at 1596-97 (Stevens, J., dissenting).

Additionally, the dissent stated that "[t]he omission of the single word 'generating' from the statute has no more significance than the omission of the same word from the text of the 1980 regulation." *Id.* at 1597 n.7 (Stevens, J., dissenting).

There are two inherent problems with the Court's use of these statutory definitions. First, the term "otherwise managing" was dismissed by the Court as not including the management of incinerator ash. Second, even if the term "otherwise managing" is not construed to include the management of ash, the term "disposing of" may be reasonably interpreted to apply to the incinerator operator's disposal of ash.

Because there is no statutory definition for "otherwise managing," the Court used the definition of "hazardous waste management" as set forth in the original 1976 enactment of RCRA.<sup>124</sup> According to this definition, "hazardous waste management" does not include generating hazardous waste. As a result, the Court concluded that the phrase "otherwise managing" could not have been meant to include the "generation" of incinerator ash.

Again the Court based its conclusion on the unsound assumption that incinerators "generate" hazardous waste. Further, the definition used, that of "hazardous waste management," logically referred to activities that occur after hazardous waste is generated. Thus, the term "generation" was not necessary when defining "hazardous waste management" because the hazardous waste had already been generated. Nevertheless, the Court relied upon this outdated definition of "hazardous waste management" to support its conclusion that incinerator ash was not exempted from Subtitle C.<sup>125</sup>

The Court also overlooked a possible construction of the clarification provision based on the phrase "disposing of." This phrase was interpreted by the Court to refer to the trash received by an incinerator and not the remaining ash. The Court looked to the definition of the term "disposal" to support this contention,<sup>126</sup> however, the Court failed to address the possibility that the phrase "disposing of" may refer to a resource recovery facility's disposal of the remaining ash residue.<sup>127</sup> This is yet another possible interpretation of the clarification provision, further supporting the assertion that the provision is ambiguous.

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124. For the statutory definition of "hazardous waste management," see *supra* note 42.

125. In 1976, the disposal of incinerator ash was not an issue. Residues remaining after incineration were first regulated by EPA in 1980 when regulations were promulgated pursuant to RCRA. See *supra* notes 30-32 and accompanying text.

126. For the statutory definition of "disposal," see *supra* note 42.

127. Justice Stevens' opinion supports this construction, noting that the activity of "disposing of" must logically refer to ash. *Chicago*, 114 S. Ct. at 1597 n.8 (Stevens, J., dissenting).

B. Legislative and Administrative History of the Clarification Provision

Principles of statutory interpretation require that if a statute is ambiguous, the court must look beyond the language of the statute.<sup>128</sup> Because the clarification provision is ambiguous, the Court erred by not giving weight to its legislative and regulatory history.<sup>129</sup> The Senate Committee Report accompanying the clarification provision suggested Congress' desire to exempt all incinerator activities from Subtitle C regulation.<sup>130</sup> As noted in the dissent, this report does not manifest an intent to subject the waste-to-energy incinerator industry to significantly increased costs.<sup>131</sup>

The Senate Committee Report stated that resource recovery facilities that accept non-hazardous commercial waste in addition to household waste are exempt from Subtitle C regulation.<sup>132</sup> The 1980 regulations promulgated by EPA were unclear on this precise issue.<sup>133</sup> In light of this provision's title and the Senate Report's statements regarding the purpose of the clarification provision, it is clear that Congress intended to include incinerator ash in the household waste exclusion.

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128. John Paul Stevens, Essay, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374-81 (1992) (citing *Chevron*, 467 U.S. at 842-43).

The five canons of statutory interpretation are the following: read the statute, read the entire statute, read the statute in its contemporary context, consult the legislative history of the statute, and determine whether the possible interpretation is reasonable in light of the legislature's intentions. See Stevens, *supra*, at 1374-83.

129. Instead of deferring to the legislative history of the clarification provision, the Court stated that the statute was the "authoritative expression of the law." *Chicago*, 114 S. Ct. at 1593.

The Court barely mentions EPA's interpretation of the clarification, stating only that EPA's interpretation went "beyond the scope of whatever ambiguity [the clarification provision] contains." *Id.* at 1594.

As rebutted in Justice Stevens' dissent, the majority's failure to attach any importance to the clarification provision's legislative history reflects "a lack of respect for the function of legislative committees." *Id.* at 1597 n.7.

130. S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). For the text of the Senate report, see *supra* note 45.

131. *Chicago*, 114 S. Ct. at 1598 (Stevens, J., dissenting). Justice Stevens reads the Senate report as emphasizing "the importance of encouraging commercially viable resource recovery facilities." *Id.* at 1596 (Stevens, J., dissenting).

132. Justice Stevens relies heavily on this report in determining that Congress intended to preserve the 1980 exemption. *Chicago*, 114 S. Ct. at 1596-97 (Stevens, J., dissenting). See *supra* notes 113-18 and accompanying text.

133. The dissent finds this lack of clarity in EPA's 1980 regulations obvious. *Chicago*, 114 S. Ct. at 1595 (Stevens, J., dissenting) ("The EPA's failure to comment expressly on the significance of adding 100 percent non-hazardous commercial or industrial waste nevertheless warranted further clarification."); see also *supra* note 113-18 and accompanying text.

## C. EPA's Interpretation of the Clarification Provision

The Court afforded no deference to EPA's interpretation of the clarification provision. The *Chevron* principles governing judicial review of an administrative agency's statutory construction were dismissed by the Court as inapplicable because the Court read the clarification statute as unambiguous.<sup>134</sup> Under *Chevron*, it is not necessary to look to the agency's interpretation where Congress has spoken directly on the specific issue in question.<sup>135</sup> Here, however, Congress did not specifically address the regulation of incinerator ash.<sup>136</sup> Therefore, *Chevron* required the Court to look to the agency's interpretation and determine whether it was "based on a permissible construction of the statute."<sup>137</sup>

The Court avoided EPA's interpretation of the clarification provision because it went "beyond the scope of [the provision's] ambiguity."<sup>138</sup> On the contrary, EPA's interpretation of the clarification provision was a plausible interpretation of the statute.<sup>139</sup> If the Court had considered the statute's legislative and administrative history, EPA's interpretation would have been deemed a rational approach. Instead, the Court relied solely on the enacted text based on the premise that statutory language is the "most reliable guide" for determining congressional intent.<sup>140</sup>

While EPA had changed its position on incinerator ash, this inconsistency can be attributed to Congress' own wavering on the issue. Any equivocation was inevitable due to Congress' failure to directly address the issue of incinerator ash. Furthermore, as noted in Justice Stevens' dissent, EPA's September, 1992 memorandum

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134. For a statement of the *Chevron* principles, see *supra* note 67. The Supreme Court in *Chevron* recognized that the judiciary has the final word on issues of statutory interpretation. *Chevron*, 467 U.S. at 843 n.9. An administrative agency's construction of a statute will be rejected where it is "contrary to clear congressional intent." *Id.*

135. *Chevron*, 467 U.S. at 842-43.

136. For a discussion of the ambiguity of the clarification provision, see *supra* notes 119-127 and accompanying text.

137. *Chevron*, 467 U.S. at 843. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

138. *Chicago*, 114 S. Ct. at 1594.

139. See *Memorandum*, *supra* note 53. The memorandum stated EPA's position that incinerator ash was exempt from Subtitle C regulation. See *id.* Justice Stevens, writing for the dissent, considers this reasonable. *Chicago*, 114 S. Ct. at 1598 (Stevens, J., dissenting). See *supra* note 118 and accompanying text.

140. *Chicago*, 114 S. Ct. at 1594.

was consistent with EPA's first adopted position as set forth in its 1980 regulations.<sup>141</sup>

#### D. Objectives of RCRA

The *Chicago* Court's holding is inconsistent with the broad policy goals of RCRA.<sup>142</sup> Although the Court paid superficial deference to RCRA's objectives, the Court selectively focused on only one objective: the regulation of hazardous waste. The Court failed to consider the role of resource recovery in Congress' environmental protection scheme.<sup>143</sup> Nowhere in the clarification provision, RCRA, or the provision's legislative history is there any indication that Congress intended to subordinate the promotion of resource recovery to the regulation of hazardous waste.

The Court's approach also ignored the congressional findings upon which RCRA is based.<sup>144</sup> In enacting RCRA, Congress recognized that the country was in the midst of a waste disposal crisis because landfills were not as safe as previously thought.<sup>145</sup> Consequently, Congress adopted policies to encourage alternative means of waste disposal, such as those which would produce energy from solid waste. Had Congress' findings been appropriately considered, the Court would have reached an opposite conclusion regarding incinerator ash.

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141. *Id.* at 1598 (Stevens, J., dissenting); see also *supra* note 67 (quoting *Chevron*, 47 U.S. at 843).

142. RCRA § 1003, 42 U.S.C. § 6902(a); see also *supra* note 27.

143. In its conclusion, the Court noted that RCRA's objectives "sometimes conflict." *Chicago*, 114 S. Ct. at 1594. For a statement of the objectives of RCRA, see *supra* note 27.

144. The Court did not consider the list of eighteen congressional findings with respect to solid waste, environment and health, materials and energy. RCRA § 1002, 42 U.S.C. § 6901. For the text of these findings, see *supra* note 27.

145. Among its findings, Congress stated that waste disposal had become a national problem which required federal assistance "in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4). Additionally, Congress found that because existing landfills could not provide reliable long-term containment of solid waste, alternative methods of disposal had to be developed. *Id.* § 1002(b)(7)-(8), 42 U.S.C. § 6901(b)(7)-(8). With respect to energy, Congress stated that "technology exists to produce usable energy from solid waste." *Id.* § 1002(d)(3), 42 U.S.C. § 6901(d)(3).

## V. IMPACT AND CONCLUSION

## A. Practical Implications

The *Chicago* decision will severely increase the cost of waste-to-energy incineration.<sup>146</sup> This expense will be incurred by municipalities, and derivatively by local taxpayers.<sup>147</sup> Incinerator operators will now be required to test all incinerator ash for toxicity.<sup>148</sup> If the ash exceeds certain criteria, it will be deemed hazardous and, consequently, will have to be disposed of in hazardous waste landfills.<sup>149</sup> Some commentators have predicted a decline in the number of operational incinerators if this cost is too high.<sup>150</sup>

Adding to the expense problem is EPA's inadequate guidance regarding how to handle the ash.<sup>151</sup> Because EPA decided not to seek a stay of the decision, the holding of *Chicago* took effect ap-

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146. Costs will increase for this nation's 171 waste-to-energy incinerators in three ways. DeLong, *supra* note 2, at 8. First, testing of ash is now required to determine if hazardous constituents are present. *Id.*; see also *supra* note 19. Second, application of hazardous waste restrictions to incinerator ash will result in incentives for expensive overcompliance. DeLong, *supra* note 2, at 8-9. For example, if there is a slight chance that a small sample of incinerator ash may test positive for toxicity, an incinerator operator will be forced to treat the whole batch as hazardous waste. *Id.* Third, incinerator ash that exceeds toxicity levels must be treated as a hazardous waste. *Id.* at 9. This ash will have to be stabilized and disposed of in a hazardous waste landfill. *Id.*

Before the *Chicago* decision, ash was dumped in non-hazardous waste landfills or special landfills designed specifically for ash at a cost of \$30 to \$50 per ton. Keith Schneider, *Incinerator Operators Say Ruling Will Be Costly*, N.Y. TIMES, May 3, 1994, at A18. The disposal of ash in hazardous waste landfills pursuant to the *Chicago* decision will cost between \$200 and \$500 a ton. *Id.*

147. Landfills are now a much less expensive option. The average "tipping fee," the cost waste haulers pay to dump municipal solid waste at landfills, is \$20.36 per ton. Groff, *supra* note 5, at 555 n.1 (citations omitted). Local governments will be most affected by the additional costs because under most standard contracts between municipalities and incinerator operators, it is the local government's responsibility to pay for testing, treatment and disposal of the incinerator ash. *Slants and Trends: Those Hardest Hit by the U.S. Supreme Court's Ruling This Week*, SOLID WASTE REPORT, May 5, 1994, at 1.

148. See *supra* note 19 (describing testing procedures under Subtitle C).

149. See *id.*

150. See Jeff Bailey, *Up in Smoke: Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J., Aug. 11, 1994, at A1 (predicting closure of municipal incinerators and bond defaults as result of unfavorable ruling on incinerator ash); DeLong, *supra* note 2, at 12-14 (questioning viability of waste-to-energy incinerators in light of competition from less expensive landfills and non-energy producing incinerators).

151. After the *Chicago* decision, EPA officials issued a guidance document titled "Sampling and Analysis of Municipal Refuse Incineration Ash." This document "explains how to design a sampling plan and criteria for evaluating data to determine if the ash passes EPA's toxicity characteristic." *EPA Requests Comments On Draft About How To Test Incinerator Ash*, SLUDGE, July 5, 1994, at 1 (criticizing draft for its inconsistency with previous EPA guidance documents and lack of clarity and fairness).

proximately one month after the date of the decision.<sup>152</sup> However, EPA has granted a reprieve to incinerator operators by designating ash as a "newly identified waste."<sup>153</sup> As a result of this designation, EPA had six months from the date of announcement to promulgate regulations specifically for ash.<sup>154</sup> Additionally, the "newly identified waste" status may overcome possible liability problems for incinerator ash that has already been disposed of as non-hazardous waste under Subtitle D.<sup>155</sup>

The *Chicago* decision will strain the already scarce hazardous waste landfill space.<sup>156</sup> Costs will increase for municipalities that do not have access to a hazardous waste dump and will be forced to transport their ash to remote dump sites. Using hazardous waste landfill space for a high volume material such as incinerator ash will substantially speed the closing of these dumps.

Because of the *Chicago* decision's detrimental effects on the incinerator industry and the paucity of landfill space, municipalities will be forced to look for alternative methods of waste disposal. As

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*See also EPA's Incinerator Ash Guidance Plays to Mixed Reviews*, HAZARDOUS WASTE NEWS, May 30, 1994, at 1 ("The agency clearly wants solid waste chaos in America."); Hazel Bradford & Ichniowski, *EPA Guidance on Ash, Sort Of*, WASHINGTON OBSERVER, May 30, 1994, at 5 ("to the regulated community, there are more questions than answers").

152. *EPA Moving Rapidly To Develop Hazardous Ash Guidance*, ENVIRONMENT WEEK, May 26, 1994, at 21 (discussing EPA's "aggressive compliance schedule").

Since the *Chicago* decision, a trade association of companies which builds municipal waste incinerators, the Integrated Waste Services Association ("IWSA"), has sought review of EPA's new requirements under Subtitle C. *Municipal Incinerator Ash Policy Challenged in Court*, PESTICIDE & TOXIC CHEMICAL NEWS, Aug. 31, 1994, at 44. IWSA has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, arguing that EPA already concluded in 1992 that incinerator ash could be safely managed as a non-hazardous waste and that this position has not changed. *Id.* IWSA also argues that EPA's reluctance to give incinerator operators adequate time to comply is unlawful, arbitrary and capricious. *Id.*

153. Extension of Date for Submission of Part A Permit Applications for Facilities Managing Ash From Waste-to-Energy Facilities, 59 Fed. Reg. 29,373 (1994).

154. *Id.*

155. Delong, *supra* note 2, at 7. With respect to newly identified wastes, RCRA generally does not subject regulated parties to retroactive liability where the parties have complied with the law as it existed at the time of the disposal. *Id.* However, reliance on incinerator ash's "newly identified waste" status may be risky because there has been only one prior case where a material which had been treated as exempt was subsequently brought under RCRA regulations by a court. *See id.* at 8; 59 Fed. Reg. 29,375 (1994).

For a discussion of possible liability of incinerator operators under CERCLA, see Wartinbee, *supra* note 4, at 131-35 (criticizing *Wheelabrator* court and EPA's inconsistencies and predicting future CERCLA liability for incinerator operators).

156. *See Groff, supra* note 5, at 584-85.

a result, programs aimed at reducing waste through recycling and public awareness may become more prevalent.<sup>157</sup>

## B. Legal Implications

In light of two competing objectives, Congress chose to promote waste-to-energy incineration by exempting incinerator ash from costly Subtitle C regulation.<sup>158</sup> Although *Chicago* appears to be the long awaited resolution of the incinerator ash issue, this holding will seriously undermine previous congressional efforts to make incinerators the primary means of municipal waste disposal.

The Supreme Court refused to accept clear congressional intent and instead, rendered its opinion largely based on public health and environmental policy concerns which should be left to the discretion of Congress. In so doing, the Court ignored established principles of statutory interpretation by disregarding the legislative history and congressional findings upon which RCRA is based.

In the future, EPA interpretation and implementation of RCRA may present a problem to the Supreme Court because *Chicago* establishes precedent which diminishes the importance of legislative and administrative history. Where an executive agency is given authority to promulgate regulations requiring special expertise, the agency's judgment should be given weight. If courts do not defer to an administrative agency's interpretation of a statute, the agency's authority will become questionable and its regulations will be increasingly vulnerable to attack.

There is also speculation that Congress purposely drafted the clarification provision ambiguously to placate special interests, leaving the real burden of clarification on the courts. If this is the case, Congress undoubtedly has shirked its responsibility as a lawmaking body. However, the lack of specific direction from Congress on an issue such as incinerator ash does not justify a court's intrusion on the legislative function.<sup>159</sup> Although the judicial function includes statutory interpretation, policymaking is beyond the scope of this function. The reasoning behind the *Chicago* holding places the respective roles of Congress and the judiciary in doubt.

157. For a discussion of the benefits of recycling, see GORE, *supra* note 1, at 158-59. But see Groff, *supra* note 5, at 14-15 (predicting that trash diverted from incinerators will end up in landfills, not recycling programs).

158. For the two policy objectives of RCRA, see *supra* note 27.

159. For further discussion of the view that the *Chicago* decision intrudes on the policymaking function of Congress, see Groff, *supra* note 5, at 586-88.



### C. Future Legislation?

The majority holding in *Chicago* leaves a primary method of waste disposal for this country hanging in the balance. This holding also reveals a reluctant Congress with respect to a significant concern—where to dispose of the nation's ever-increasing volume of trash. Congress still has the power to correct this situation. Enacting legislation which specifically covers the regulation of incinerator ash would further RCRA's goals of promoting resource recovery while safely disposing of the nation's waste.<sup>160</sup> Most importantly, legislation targeting incinerator ash would minimize compliance costs for incinerators and leave no unanswered questions in the process.<sup>161</sup>

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160. Currently, EPA is considering a proposal for the regulation of incinerator ash submitted by EDF. *EDF Drafts Legislation in Effort to Ensure Incinerator Ash Safety*, HAZARDOUS WASTE NEWS, July 4, 1994, at 27. This proposal directs "that all incinerator ash be disposed of in specifically designed monofills, thereby negating the need for costly and possibly ineffective testing." *Id.*

This proposal went to Representative Al Swift (D-Wash.), Chairman of the House Energy Subcommittee on Transportation and Hazardous Materials. *Incinerator Ash Proposal Will Go to Rep. Swift, Congress This Week*, SOLID WASTE REPORT, Aug. 11, 1994, at 1. A bill based on this proposal is predicted to have wide support from both municipalities and incinerator operators. *Id.*

161. Costs of compliance with the *Chicago* decision would be reduced by legislation which allowed disposal of ash in specially designed monofills without testing. If ash could be disposed of safely without the costly testing procedure required by Subtitle C, incinerators would be able to continue as a viable waste disposal alternative. See *EDF Drafts Legislation in Effort to Ensure Incinerator Ash Safety*, HAZARDOUS WASTE NEWS, July 4, 1994, at 27.